

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAYER HEALTHCARE	.	
PHARMACEUTICALS INC.,	.	
	.	
Plaintiff,	.	Case No. 10-cv-02734
	.	
vs.	.	Newark, New Jersey
	.	February 24, 2016
BIOGEN IDEC INC.,	.	
	.	
Defendant.	.	

TRANSCRIPT OF TELECONFERENCE
BEFORE THE HONORABLE JAMES B. CLARK, III
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings at 12:06 P.M.)

2

3 THE COURT: Hey, folks, Judge Clark here. I hate
4 to do this to you again, because I know you just went through
5 the appearances with my clerk in chambers, but we're on the
6 record, so if I could get everybody's appearances.

7 Can we start with Mr. Marino.

8 MR. MARINO: Yes, good morning, Your Honor, it's --
9 Marino, Marino Tortorella & Boyle for plaintiffs.

10 And with me are -- is my colleague John Tortorella,
11 and also from Paul Weiss, we have Nick Groombridge, David
12 Ball, and Peter Sandel.

13 THE COURT: Good morning to all of you.

14 MALE SPEAKER: Good morning, Judge.

15 THE COURT: All right. And how -- how about
16 Pfizer, Novartis?

17 MR. CHEVALIER: Good morning, Your Honor, this is
18 Charles Chevalier from Gibbons PC for EMD Serono, Pfizer and
19 Novartis. And there are separate cocounsel on the line for
20 each.

21 THE COURT: All right.

22 MR. BARSKY: Good morning, Your Honor, this is
23 Wayne Barsky from Gibson Dunn for Serono and Pfizer. And
24 with me on the line are my colleagues Timothy Best and Robert
25 Vincent.

1 THE COURT: Good morning. I guess, good afternoon,
2 at this point.

3 MS. MORIOKA: Good morning, Your Honor, this is
4 Leslie Morioka, White & Case for Novartis Pharmaceuticals
5 Corporation.

6 THE COURT: Okay. Anybody else -- everybody --

7 MR. GOODMAN: Yes, Judge, from Bayer, Bob Goodman
8 from Greenbaum Rowe, and from Williams & Connolly, Eric
9 Wiener, David Krinsky, and David Berl.

10 THE COURT: Good afternoon.

11 MALE SPEAKER: Good afternoon, Your Honor.

12 THE COURT: Did we get Leslie Morioka?

13 MS. MORIOKA: Yes.

14 THE COURT: We did? Okay.

15 MS. MORIOKA: Your Honor, I -- yes.

16 THE COURT: And did we have Mr. Best enter an
17 appearance as well?

18 MR. BEST: Yes, Your Honor.

19 THE COURT: Okay. All right. It looks like we
20 have everybody.

21 Folks, I know we've gotten a raft of letters. I
22 apologize for not having gotten you on the wire earlier, but
23 we've got you on the line relatively soon. The
24 correspondences I have are Number 384 from counsel for Serono
25 and Pfizer; 387 from counsel for Biogen; 388 from counsel for

1 Serono and Pfizer; 389 from counsel for Bayer; and then 390
2 from counsel for Biogen. And they're all the correspondences
3 that bear on today's phone call.

4 We really have three issues. One -- the first
5 issue is the question of whether or not Biogen needs to
6 produce somebody for a 30(b)(6) deposition. Now, it appears
7 that Biogen freely admits that Serono and Pfizer are entitled
8 to take a 30(b)(6) deposition. It's just a question of
9 whether or not the person that's deposed can be asked for
10 legal questions or legal conclusions or work product or
11 things that would tread on what, you know, would normally be
12 an attorney's opinion, rather than -- rather than bare facts.

13 Now, Mr. Marino, I -- you know, I understand your
14 position, and I generally agree with it.

15 But why -- I mean, do you think that counsel for
16 Serono and Pfizer is wrong in saying, hey, look, we'll have
17 the deposition, and we'll ask the questions, we'll try to
18 confine it to facts, but if they find something is
19 inappropriate, they can object.

20 MR. MARINO: Well, you know, Your Honor, I'd like
21 to have Mr. Groombridge weigh in on it, but I think --
22 they've already made clear -- I mean, I would certainly agree
23 with the Court in the normal course, you know, you await the
24 event. Right? They can take a 30(b)(6) deposition. We
25 produce the appropriate corporate representative, and then,

1 | you know, what questions are permissible and impermissible
2 | await the event.

3 | Here, they've made clear that they intend to probe
4 | impermissible questions. And so rather than get into a
5 | situation where the deposition's proceeding and then we have
6 | to stop the deposition and try to engage Your Honor on an
7 | emergent basis, I thought it made sense -- we thought it made
8 | sense to tee this issue up and have resolution of it.

9 | Those types of questions, I think -- and Your Honor
10 | indicated you tend to agree -- those questions are not
11 | permissible. Those are -- that's -- that's not fact
12 | questions of the type that a corporate representative
13 | typically is asked to or does provide on behalf of the
14 | corporate entity.

15 | THE COURT: Well, let me -- let me interrupt you,
16 | Mr. Marino, because I -- the letters were from you, but do
17 | you want Mr. Groombridge to do the talking for your --

18 | MR. MARINO: I'm happy to have -- Nick -- Nick, I
19 | think you may want to weigh in on this?

20 | MR. GROOMBRIDGE: I would like to, and thank you,
21 | Your Honor. Nick Groombridge.

22 | So there's been a fairly lengthy meet-and-confer on
23 | this and on the -- with the upshot of it is we, Biogen, we'd
24 | be perfectly happy to provide a witness regarding facts that
25 | are in Biogen's possession. And we've said that over and

1 over again. And just to be clear, Your Honor, we actually
2 think that all of the relevant facts have already been the
3 subject of discovery, but if Serono believes we're wrong on
4 that, we're happy to provide another witness.

5 The dispute, as we understand it through the
6 meet-and-confer is whether Biogen is required to provide a
7 witness about what Serono wishes to ask. And the -- what --
8 what brings -- Your Honor saw here is the fact that the --
9 the category -- including any contention that Serono would
10 have withdrawn Rebif from the market rather than -- and at
11 the best we can tell through the meet-and-confer process,
12 what Serono wants is a witness to testify about what Serono
13 would have done.

14 And in our view, Your Honor, that's not an
15 appropriate topic for this type of discovery, that that's
16 purely a contention, and it seems to be -- we've made this
17 point to them -- it would be the witness. Are you requiring
18 us to --

19 THE COURT: In this regard --

20 (Simultaneous conversation)

21 THE COURT: -- are you -- are you objecting,
22 though, to that question on so much because it's a legal
23 issue or just because it sounds speculative?

24 MR. GROOMBRIDGE: Well, I think, Your Honor, we
25 that have a whole variety of differences of opinions with

1 Serono about whether that's a proper question.

2 But I think we're objecting because we feel that
3 that is, by its very nature, a question that's a contention.

4 And quite frankly, the way we see it, the only way
5 we can answer that would be to have a member of our
6 litigation team be the witness. And they would ask, Tell us
7 what you've learned from us in discovery, and tell us what
8 your -- what our witnesses said that leads you to argue that
9 we would have taken -- or not taken --

10 And that seems to be the area of dispute.

11 We have repeatedly said, if what you want is --
12 from Biogen to talk about predicate facts, such as if Biogen
13 has enough manufacturing capacity to make these products or
14 what would Biogen's profit margin be, totally fine. We will
15 absolutely give you such a witness, not a problem.

16 If what -- and every time -- and, you know, we went
17 around this three or four times in the meet-and-confer
18 process, every time that the response was that's not
19 sufficient, that's not what we're interested in. What we're
20 interested in is something -- is someone to testify about
21 what you say we, Serono, would have done.

22 And that's, I think, the nub of the question.
23 If -- in our view, Your Honor, there's been copious discovery
24 on the true underlying facts. And there doesn't seem to be
25 any allegation that that's deficient. If they want more,

1 we're happy to provide it -- given -- but the dispute isn't
2 about that type of discovery at all. I think it's about this
3 idea of you've got an obligation to produce someone who will
4 give deposition testimony regarding its -- contention.

5 And in our view, that's just not an appropriate --
6 and when we've asked them, who would the witness be, you
7 know, we --

8 THE COURT: It's going to hard --

9 (Simultaneous conversation)

10 MR. GROOMBRIDGE: -- we can only see that --

11 THE COURT: It's going to be hard to narrow down --
12 it's going to be hard to narrow down, though, and I have
13 letters, but I have precious little in the way of examples.

14 And they're certainly allowed to probe what it is
15 you claim are damages, and, you know, it's a -- and even what
16 it is you would have done, that doesn't smack to me of a
17 legal conclusion so much as it smacks to me of a -- a kind of
18 exercise in speculation. It may not be appropriate, but --
19 well, let me -- let me ask the other side.

20 And, Mr. Barsky, are you going to speak on behalf
21 of Serono?

22 MR. BARSKY: If that's all right with the Court,
23 yes, Your Honor. Thank you.

24 THE COURT: Fine. So what do you say?

25 MR. BARSKY: Well, Your Honor, I hope -- the Court

1 just put its finger on the issue, which is, from our view,
2 we're entitled to probe the basis of their lost profits
3 claim.

4 From the beginning of this case, they have had a
5 claim that but for Serono and Pfizer's alleged infringement
6 of their patent, we would -- that Biogen would have made the
7 sales that we otherwise would have made.

8 Now, what we all know is that the core of that
9 claim is the suggestion by Biogen that rather than having --
10 taking action that would be not -- noninfringing in some
11 hypothetical world, because that's what the lost profits
12 argument requires, it's the -- is an examination of this
13 hypothetical world, rather than taking some noninfringing
14 action in order to continue competing with Biogen, that,
15 instead, Serono would have withdrawn its billion-dollar
16 a-year flagship product from the market.

17 That has been their contention in this case from
18 day one. And when we presented a motion for summary judgment
19 on their lost profits claim to Judge Cecchi, the hearing for
20 which was held approximately a year ago, Biogen told Judge
21 Cecchi at that time that there were disputed factual
22 issues --

23 THE COURT: Right.

24 MR. BARSKY: -- with respect to whether or not
25 Serono and Pfizer would have, in fact, pursued a

1 noninfringing alternative or instead would have tried to
2 continue competing -- excuse me -- would have instead removed
3 Rebif from the market.

4 So at the core of their claim, at the core of
5 Biogen's lost profits claim is the suggestion that Serono
6 would rather have withdrawn Rebif from the market and pursued
7 a noninfringing alternative.

8 That is precisely the position that we have been
9 trying to probe since October, because all -- Mr. Marino's
10 suggested that, you know, Biogen -- in fact, what has
11 happened is that since October -- a -- an effort to try to
12 get a deposition on this one subject that goes directly to
13 their lost profits claim as to the new products Tecfidera and
14 Plegridy that Biogen heard were so important that they
15 merited a supplemental discovery period.

16 As the Court knows, we opposed that effort. We
17 didn't think it was appropriate. The Court ordered that the
18 supplemental discovery should go forward, and we cooperated
19 in every respect with that effort.

20 In total, there's probably been 70 or 80
21 depositions, individuals deposed in this case in the last
22 four or five years.

23 This is the only deposition for which any party has
24 ever heard that -- special rules. And to be clear, that's
25 Biogen's position that --

1 THE COURT: Mr. --

2 MR. BARSKY: -- how much every other deposition --

3 THE COURT: All right.

4 MR. BARSKY: I'm sorry, Your Honor?

5 THE COURT: No. That's -- you're right. Let me
6 just ask Mr. Groombridge. It's a little ironic. You were
7 the folks that came to me looking for an avenue additional
8 discovery and now you're resisting additional discovery.

9 MR. GROOMBRIDGE: Your Honor, if I may -- but, yes,
10 by no means resist additional discovery. We've produced
11 hundreds of thousands of pages. We made many witnesses
12 available for deposition.

13 And to the extent there was some suggestion that we
14 have been -- I would say, Your Honor, there's something like
15 80 percent of the supplemental discovery has taken place over
16 the past few months comes from Biogen and not from the other
17 parties.

18 And --

19 (Simultaneous conversation)

20 THE COURT: Well, I --

21 (Simultaneous conversation)

22 THE COURT: I appreciate Mr. Marino's observation
23 that you know, we like to tee things up when we can, but this
24 has only been teed up in the most bare-bones of ways. I have
25 some very short letters saying that, oh, they want to probe

1 | what we're going to be doing and that -- what we might have
2 | done, and that does tread on contingent interrogatory -- or
3 | contentions, and contentions need be answered by lawyers and
4 | cannot be answered by -- a 30(b)(6) fact witness.

5 | I'm not entirely sure that the observation that
6 | contentions need to be answered in interrogatories rather
7 | than in depositions is correct. But I think the only -- the
8 | only option, really, practically available to me right now is
9 | to direct that the 30(b)(6) discovery deposition go forward
10 | and to leave it to counsel for Biogen to -- to object, you
11 | know, when there is a genuine question of whether legal
12 | opinions or legal analysis is what's being sought from the
13 | 30(b)(6) witness.

14 | And I'll caution you, Mr. Groombridge, I'm going
15 | to -- you know, err on the side of allowing testimony. I
16 | don't want this to become a really obstructive thing. I
17 | don't imagine -- I think there's probably a lot of things
18 | that counsel for Serono implies it can ask that would have
19 | nothing to do with legal opinions or, you know, how the law
20 | applies to the facts of the case. And I do -- you know, we
21 | did order extra discovery to allow people to probe it.

22 | And it does sound like, you know, at the summary
23 | judgment argument, it was offered to Judge Cecchi, but there
24 | are fact issues that exist with respect to damages and need
25 | to be -- and need to be explored.

1 So, you know, the 30(b)(6) deposition will go
2 forward, again with the right of the -- of Biogen to object
3 as appropriate. But --

4 MR. MARINO: But, Your Honor, may I --

5 THE COURT: Go ahead.

6 MR. MARINO: -- not to -- Kevin Marino. Just a
7 question on that, because I certainly -- I hear Your Honor
8 saying, you know, the deposition will go forward, and, you
9 know, as the questions are asked, appropriate objections will
10 be interposed and obviously not in an obstructive way.

11 But I think we would -- and, you know, I'll again
12 welcome Mr. Groombridge to interrupt if he has a different
13 thought, but we'd like to have more guidance at time on what
14 the Court thinks would be an appropriate area of inquiry for
15 these witnesses. Your Honor seemed to -- there are a number
16 of questions that could be asked. But it seems to me that
17 part of what they're asking for here goes to very much a -- a
18 legal position. You know, they seem to be challenging the
19 legal position that we've taken. And I don't really
20 understand what a 30(b)(6) witness, a corporate
21 representative for the company, is going to be able to
22 provide to illuminate that separate from impropriety of
23 asking them when you say, you know, you don't have to --
24 necessarily interrogatories as opposed to depositions.

25 I -- you know -- the distinction isn't so much

1 between the forms of discovery that are taking as between who
2 provides them. And the thought is -- I think that if you're
3 probing the legal reasons, that is to say the reasons we
4 believe the law precludes this type of inquiry of a fact
5 witness, I -- for a legal battle. And I agree, it's to --
6 been sketched out -- terms in the papers.

7 But I do think we're heading down a road of not
8 only that it's going to be fruitless, I don't think it's --
9 it's difficult for me to conceive if it's not -- what might
10 be perceived as obstructive, because I'm not -- to -- all
11 sort of questions they could ask that would be appropriate.

12 MR. BARSKY: May I address that, Your Honor?

13 THE COURT: Mr. Barsky, yeah.

14 MR. BARSKY: Just very briefly, first, we're not
15 interested in asking purely legal contentions, such as what
16 do you contend is the statute of limitations that applies in
17 this case? What do you content is the appropriate standard
18 for determining the doctrine of equivalents and the like.

19 What we need -- intend to pursue -- is the basis of
20 their lost profits claim. They're the ones who have that
21 claim. And in order to defend our client against this
22 multibillion -- claim, we would like just to have a witness
23 testify as to all information that's available to the
24 company.

25 And I think what I heard Mr. Marino just suggest

1 was that there are different rules that somehow apply to
2 Biogen and this deposition than all of the other parties and
3 all of the other 80 depositions in this case, that somehow
4 there has to be some negotiating structure for this
5 deposition.

6 And that's what we find so anomalous here.

7 THE COURT: Well, Mr. Marino, I mean, it sounds to
8 me like this is being a lot more complicated than it needs to
9 be. If they want to ask you questions about lost profits --
10 you know, you're claiming lost profits, that's -- how in the
11 world is that not an appropriate factual inquiry? That --
12 that's one of the most factual inquiries you're going to
13 engage in.

14 MR. GROOMBRIDGE: Maybe -- Nick Groombridge --
15 response.

16 THE COURT: Sure.

17 MR. GROOMBRIDGE: I think the -- the problem is
18 this that we perceive Your Honor, to the extent they want to
19 ask us about facts that we know, that's totally fine.

20 But what they want to ask us is facts about what
21 they know. And what I heard Mr. Barsky just say and what I
22 think the dispute is about is they say, Biogen, please
23 produce a witness to testify about what Serono would have
24 done. And in our view, Your Honor, that's -- how do we know
25 what they would have done --

1 (Simultaneous conversation)

2 THE COURT: Well, and that's probably --

3 MR. GROOMBRIDGE: -- the fact is you --

4 (Simultaneous conversation)

5 THE COURT: -- that's probably what the answer's
6 going to be. But even there, I don't know that I'm getting
7 into legal territory. I'm just getting into questions that
8 you probably have no basis or your witness would probably
9 have no basis for answering.

10 MR. GROOMBRIDGE: I think, Your Honor, that may
11 provide us the guidance that we need. If what we -- if the
12 Court's direction here is that we find a -- an appropriate
13 corporate representative from Biogen and produce that person
14 to testify about facts known to Biogen -- the lost profits
15 claim, that will be fine. And if there be questions what
16 does Biogen know about what Serono would have done, I presume
17 the answer will be, Biogen doesn't know anything -- any sort
18 of knowledge is what's happened in discovery in this lawsuit,
19 which is not -- the Biogen witnesses are not allowed to see
20 that on the protective order.

21 THE COURT: That --

22 MR. BARSKY: Your Honor, very briefly, this is
23 Wayne Barsky.

24 You know, that was all very clever, but the problem
25 with that is that the basis of Biogen's claim of lost profits

1 is inherently a position about what Serono would have done.
2 And so we cannot defend our client in this
3 multibillion-dollar claim, we cannot prepare for the trial of
4 this case and what Biogen claims are all these disputed
5 issues -- unless and until we know what the basis of that
6 position is.

7 And 30(b)(6) doesn't simply stand for the
8 proposition that a witness be produced with blinders on who
9 is oblivious to facts that perhaps were the subject of
10 discovery. It requires that they produce a witness who will
11 educate him or herself as to all facts that are reasonably
12 within the -- within the ken of the corporation upon -- upon
13 reasonable inquiry.

14 And so, you know, I don't think what
15 Mr. Groombridge just tried to do to re- -- to recast what the
16 Court just -- the Court just articulated is the purpose.

17 Now, if Biogen wants to concede that it has no
18 information whatsoever about what Serono would have done in
19 this hypothetical world where Serono would not have allegedly
20 infringed, that's a different -- that's a different story.

21 But Mr. Groombridge is never going to concede that,
22 because that's the very core, the heart of his lost profits
23 claim. And that's what we want to explore.

24 THE COURT: Well, Mr. Groombridge, I mean --

25 (Simultaneous conversation)

1 MR. GROOMBRIDGE: -- of the Court --

2 THE COURT: -- Mr. Groombridge, I do -- I do --

3 (Simultaneous conversation)

4 THE COURT: Their point, you know, I don't know
5 whether you institutionally have that information or not,
6 but, again, I'm not entirely sure how it treads on legal
7 opinion or contentions. I mean, they're asking what you know
8 about what they might have done. It's still -- it maybe
9 attenuated, and it may be speculative, but it still seems
10 like it's a -- the fact -- question is based in fact or based
11 or your knowledge of what the facts would be.

12 MR. GROOMBRIDGE: Your Honor, I think what it's
13 based on is -- is -- to say, please review all of these --
14 someone should review all of the discovery that Serono has
15 provided in this case and then go through and say, what do
16 you find in there that in your view supports your argument,
17 and the -- that brings us back to the situation of what -- in
18 our view, then you put the 30(b)(6) as a discovery tool is
19 appropriate for saying, tell us what Biogen knows. But it's
20 not appropriate for it at all to say that -- and have them go
21 through the entire body of discovery, which is asked in this
22 case.

23 THE COURT: Well, Mr. Barsky, you're not --

24 (Simultaneous conversation)

25 MR. GROOMBRIDGE: -- be cross-examined by an

1 opposing counsel on their -- their theories and contentions
2 and arguments that will be made by some fact discovery that,
3 in our view, that that -- what that is, really, is trying to
4 get a head start on expert discovery. The experts will do
5 those kind of things.

6 THE COURT: Well, Mr. Barsky --

7 MR. GROOMBRIDGE: -- expert --

8 THE COURT: Mr. Barsky, are you suggesting that
9 they find somebody to go through all of the discovery you've
10 provided from -- on your end and make, you know -- and offer
11 opinions on that discovery as to what might have happened?
12 Or are you asking for, you know, what might fairly have been
13 the institutional knowledge of Biogen at the relevant time
14 period?

15 MR. BARSKY: Well, Your Honor, at the outset of
16 this lawsuit, they brought the lost profits claim against us.
17 And that lost profits claim is based on the suggestion that,
18 had we not infringed, we would have simply withdrawn from the
19 market.

20 At the summary judgment argument, they -- they
21 contended that there were disputed facts. We would like to
22 be able to defend our client by finding out what is the basis
23 for their session that Serono would have soon have withdrawn
24 its flagship, billion-dollar-a-year product from the market,
25 than, for example, in this case, executed an option agreement

1 which would have given Serono a contractual right to sell
2 Rebif -- in direct competition with Biogen.

3 THE COURT: Have you asked that --

4 MR. BARSKY: We want an answer to that question
5 and --

6 (Simultaneous conversation)

7 THE COURT: Have you asked that question in
8 interrogatories?

9 MR. BARSKY: I believe we have, but --

10 THE COURT: Did you get an answer?

11 MR. BARSKY: -- I don't remember -- if Mr. Vincent
12 is online, he might be able to -- on this.

13 MR. VINCENT: We have asked interrogatories that go
14 to the basis of their lost profits claim in a general -- in a
15 general manner. And we have not -- you know, as far as I
16 understand, the -- the responses that we have received have
17 not provided any kind of delineation of the factual issue
18 that would preclude some -- for example -- support their
19 claim that we would have taken that off the market.

20 MR. GROOMBRIDGE: Your Honor -- sorry, I don't mean
21 to interrupt you Mr. Vincent.

22 THE COURT: Go ahead.

23 MR. GROOMBRIDGE: I'm sorry. But what -- they have
24 asked an interrogatory, and we have responded to them, and
25 until today, there has been no suggestion that the response

1 to that was in any way deficient, and --

2 MR. BARSKY: Well, Your Honor, if -- if that
3 interrogatory --

4 (Simultaneous conversation)

5 MR. BARSKY: -- has provided Biogen's complete
6 explanation for its position that we would have withdrawn
7 from the market in event of non -- alleged noninfringement,
8 then I'm certain that Biogen would have brought that to the
9 Court's attention before now.

10 But it doesn't.

11 My recollection of the response is that that this
12 is -- you know, wait till expert discovery, we'll provide an
13 expert on this, and you can cross-examine our expert, which
14 is obviously not the case.

15 THE COURT: Yeah, I mean, Mr. Groombridge, if there
16 are -- if there are -- if there is anything in the way, you
17 know, of factual knowledge -- I agree with Mr. Barsky, we're
18 not supposed to show up with a 30(b)(6) witness who's not
19 done any homework and who simply, you know, sits in the chair
20 and says, I don't know, I don't know, I don't know, I don't
21 know. That's -- that is kind of defeating the purpose. I
22 also don't know that you have to speculate on things that
23 come out of discovery that's been provided to you by the
24 other side. It's -- facts that were known to Biogen during
25 the relevant period of time.

1 But I certainly think that at least preliminary
2 inquiry into what your contention -- you know, the -- that
3 they would have withdrawn from the market or that they -- I
4 mean, if it was -- if it was an expectation that Biogen had
5 that something may happen, you know, I don't know --
6 what's -- what's incorrect about answering a question like
7 that?

8 MR. GROOMBRIDGE: Your Honor, to the extent that
9 there were underlying facts here, I think it would -- it's
10 totally fine to us about -- and by the way, I think they
11 have.

12 But I do want to be clear that many times now
13 Mr. Barsky has said -- has made this allegation that we
14 contend they would have withdrawn from the market.

15 That's not the basis of Biogen's position. And in
16 our view, this is all -- this is addressed in the pending
17 summary judgment motion --

18 THE COURT: Well, that's Mr. Barsky's problem, if
19 he -- if he doesn't understand your position or is
20 mischaracterizing it, then he's doing that at his own peril
21 and maybe he won't be able to sufficiently rebut your
22 arguments.

23 But I just don't see where we're treading into --
24 you know, impermissibly into legal opinion or legal
25 conclusion. You know, there's got to be some latitude to ask

1 | these questions.

2 | I'm back to where I was at the beginning. You
3 | know, I appreciate the fact that we've -- that we've tried to
4 | see this up, but I think the deposition has to go forward. I
5 | think some of the distinctions here are distinctions without
6 | a difference, and we're -- I won't say we're being cute, but
7 | we're being hypertechnical, perhaps.

8 | But the -- the scope of discovery's broad. They're
9 | allowed to ask questions with respect to facts, and facts
10 | sometimes include an element of expectation or -- or, you
11 | know, a supposition. There comes a point where supposition
12 | and expectation become pure speculation, and I don't know
13 | that that's appropriate for a deposition. But you're going
14 | to have to deal with those one at a time as you go through
15 | the deposition.

16 | And I'll be honest with you, if you have to come
17 | back to me with a couple of discrete problems, that's great.
18 | But I'm not -- I can't imagine that a deposition conducted in
19 | good faith here is going to be -- you know, come back to me
20 | with 500 questions, 500 objections and instructions not to
21 | answer, and we're going to have to parse through this and
22 | take a whole day doing it. I'm not -- that's not my aim.
23 | And I don't think that that should be -- the result of the
24 | 30(b)(6) deposition in this particular situation.

25 | All right, folks?

1 UNIDENTIFIED SPEAKERS: Thank you, Your Honor.

2 THE COURT: So that's what we're going to do with
3 the 30(b)(6) deposition of Biogen.

4 The other issue -- there's two issues. One is can
5 we extend the expert deadline for four weeks? And I know
6 Biogen wanted to do that and that there was some resistance
7 from Serono -- or Serono and Pfizer.

8 We've already gone past the time a little bit by at
9 least a few days. And I think we're going to have to do the
10 four-week extension because we have a problem between Bayer
11 and Biogen with respect to the documents that Biogen wants to
12 show to Dr. Denis -- is it Denis or Denis?

13 MR. GROOMBRIDGE: Denis, Your Honor.

14 THE COURT: All right. Now, you flagged that issue
15 for me.

16 So -- so let me say first, we will extend the
17 expert deadline for four weeks. But we now have to deal with
18 this -- this issue, does Dr. Denis get to see these
19 particular documents. And quite frankly, both sides Bayer
20 and Biogen have only in very, very cursory terms even
21 discussed what documents we're talking about, and frankly
22 both of you also invited or urged me to consider supplemental
23 briefs on the question. So I think I'm going to -- I think
24 I'm going to ask you to do that.

25 How many documents are we talking about,

1 Mr. Groombridge?

2 MR. GROOMBRIDGE: I don't believe it's very many,
3 Your Honor. The -- I don't know the exact number, but I
4 think it's probably in the --

5 THE COURT: All right. Well, can you -- and, you
6 know, given that we're sort of working on a tight time frame,
7 how soon -- I guess, you'd be the first one, you are the one
8 that wants to show the documents to your expert, so you'd be
9 the first one to give me a brief. How soon could you give me
10 something? And let's keep it manageable, you know. Five --
11 well, you tell me, you tell me, how soon can you do it, and
12 how long would -- how many pages would you want to do?

13 MR. GROOMBRIDGE: If we -- first of all,
14 Your Honor, we could do -- if it's more convenient with the
15 Court, we could do this in the form of a follow-up letter.

16 THE COURT: That would be fine.

17 MR. GROOMBRIDGE: And we could certainly do -- do
18 that a week today.

19 THE COURT: All right. And then for Bayer,
20 Mr. Goodwin [sic], would you be able to respond a week after
21 that?

22 MR. GOODMAN: -- from -- colleague respond to that,
23 Judge.

24 MR. WIENER: Your Honor, this is -- Your Honor,
25 this is Eric Wiener from Williams & Connolly. A week after

1 Biogen's letter to respond is fine with Bayer.

2 THE COURT: All right. And I will -- because we're
3 on such a tight time frame, we will endeavor to get you a --
4 an answer to the question as quickly as we can so we can --
5 so we don't have to go past -- any past the four-week
6 extension we're already -- we're already imposing on the
7 expert deadlines. All right?

8 MR. GROOMBRIDGE: Yes.

9 THE COURT: So I think -- those were the three
10 things I could -- I could tell from the letters -- from the
11 five letters I've gotten in recent weeks with respect to the
12 case.

13 Is there anything else that we needed to discuss
14 today?

15 MR. WIENER: Your Honor, this is Eric Wiener from
16 Williams & Connolly for Bayer.

17 Just so we understand and have clarity on the
18 extension, are -- is -- what is the exact date that the
19 expert deadline would be? Is it four weeks from the original
20 deadline, *i.e.*, four weeks from last Friday? Or is it four
21 weeks from today?

22 THE COURT: Well, let's -- let's see. It's --
23 we're going to take -- the briefing is going to take you to
24 March 9th. Four weeks from the old deadline would be
25 perilously close to that date.

1 So I think it probably should be four weeks from
2 today. All right? Just so we build a cushion in so that the
3 experts can do what they have to do. I think that the
4 extension, I think we're already about five or six days past
5 what the old deadline was, but we'll make it four weeks from
6 today. All right?

7 MR. WIENER: Yes, Your Honor. This is Eric Wiener
8 again.

9 Just to be clear, that means the new deadline would
10 be March 23d?

11 THE COURT: Looks like it.

12 MR. WIENER: Thank you, Your Honor.

13 MR. BARSKY: And, Your Honor, Wayne Barsky.

14 Not to belabor the instruction, but I assume that
15 the -- that Biogen will be in a position to provide a
16 30(b)(6) witness during this extended period of time?

17 THE COURT: Yeah, I --

18 (Simultaneous conversation)

19 MR. BARSKY: Within the next four weeks.

20 THE COURT: I am not putting a deadline on it, but
21 that's a fair question.

22 Now, Mr. Groombridge, is that -- are you going to
23 be able to do that?

24 MR. GROOMBRIDGE: I think we can do that,
25 Your Honor. And I think we would rather just get this done

1 with and see if we can move forward.

2 THE COURT: All right. Then we'll -- -- we'll have
3 that -- we'll have that 30(b)(6) deposition conducted within
4 the stay [sic] period. All right?

5 MR. GROOMBRIDGE: Yes, Your Honor.

6 THE COURT: All right. Anything else, folks?

7 MR. BARSKY: Just thanks for the Court for hearing
8 us this morning.

9 THE COURT: Oh, like I said, I'm sorry I -- I
10 probably -- I was out at a -- at my daughter's -- they have a
11 junior parents weekend at her college, and that ate up most
12 or -- a part of last week. I should have probably gotten you
13 on earlier than now, but we'll try to keep things moving, and
14 we'll try to get you a decision on the -- the two letter
15 briefs you're going to send as quick as we can. All right?

16 (Conclusion of proceedings at 12:43 P.M.)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 31 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ ***Sara L. Kern***

25th of February, 2016

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